Supreme Court, U.S.
FILED
DEC 8 1997
CLERK

No. 97-530

In The
Supreme Court Of The United States
October Term, 1997

CHRISTIAN E. PORTER,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

In affirming the petitioner's conviction below, the appellate court found the following:

> "The jury could have reasonably found the following facts. At approximately 10:15 p.m. on July 20, 1992, the defendant and his wife smelled smoke in their house. The defendant's wife and child went to a neighbor's house, and the defendant remained behind. The defendant arrived at the neighbor's house five to ten minutes later, explaining that he had sprayed a smoking electrical box with a fire extinguisher. The defendant also set up fans to clear away the remaining smoke. The defendant then left the neighbor's house, returning later with bloodshot eyes and a towel covering his mouth and nose. After drinking a glass of water, the defendant telephoned his brother-in-law, a licensed electrician, for advice about the electrical box. At some point during the conversation, the defendant looked out the window and shouted that his house was on fire.
>
> * * *
>
> Three separate fires started in the defendant's house when the defendant was alone there. Tests of materials taken from the house revealed the presence of flammable liquids. The state's fire expert concluded that the fires had been intentionally set and discounted the defendant's

theory that the fires started due to faulty electrical wiring."
State v. Porter, 39 Conn. App. 800, 801, 804, 668 A.2d 725 (1995).

The petitioner did not testify. Instead he sought to introduce testimony of a polygraph examiner retained by him after his arrest, and without notice to the state, that on January 27, 1993 he denied setting fire to his house, and that in the opinion of the polygraph examiner he was truthful when he made the denial. Id., 801; T. 1/21/94, 2-26; Defendant's Motion to Admit Results of Polygraph Examination at Trial, dated September 17, 1993 with attached letter from polygraph examiner dated January 28, 1993.

REASONS FOR DENYING THE WRIT

In United States v. Scheffer, No. 96-1133, this court has before it the issue of whether a per se rule of evidence barring the use of polygraph evidence in court-martial proceedings is an unconstitutional infringement on a defendant's right to present a defense. In that case the defendant, who testified and whose credibility was impeached on cross-examination, attempted to offer the result of a polygraph examination to support his testimony. The United States Court of Appeals For The Armed Forces held that Military Rule of Evidence 707 insofar as it bars the use of such evidence when offered by an accused to rebut an attack on his credibility unconstitutionally infringed on a defendant's right to present evidence. United States v. Scheffer, 44 M.J. 442, 445 (1996). Even if this Court should affirm that decision and hold that a per se rule barring the use of polygraph evidence is unconstitutional, the decision of the Connecticut Supreme Court in this case is still correct. Because the

petitioner never testified at trial and his credibility was not impeached, the evidence was inadmissable under other traditional rules of evidence.

The petitioner does not claim, and has not cited a case supporting a claim, that the results of the polygraph examination and his out of court statements on which the results were based were admissible for substantive purposes. The statements themselves if offered for the truth of the matter asserted are hearsay under established Connecticut law. State v. Crafts, 226 Conn. 237, 253, 627 A.2d 877 (1993); State v. Esposito, 223 Conn. 299, 315, 613 A.2d 242 (1992). Unless falling into one of several well-established exceptions to the hearsay rule, these statements are inadmissable, State v. Oquendo, 223 Conn. 635, 664, 613 A.2d 1300 (1992). There is no exception permitting a defendant to offer his own out of court statements for the truth of the matter asserted. Since the statements made by the petitioner were inadmissable for the truth of the matters asserted, the opinion of the polygraph examiner was irrelevant.

The petitioner was not precluded from offering his own version of the events nor was he precluded from offering any relevant exculpatory evidence. He was available to testify at trial. He never made a claim at trial that his decision whether or not to testify would be influenced by the court's ruling on his motion to admit the results of his polygraph examination. At no time did he even offer a theory as to why the results were relevant.

The only possible relevancy of the polygraph evidence would be to support or rehabilitate petitioner's testimony after his credibility had been impeached by cross examination. cf United States v. Piccononna, 885 F.2d 1529, 1535-1536 (11th

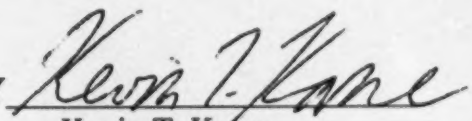
Cir. 1989); United States v. Cordoba, 104 F. 3d 225, 229 (9th Cir. 1997). A prior consistent statement of a witness is not admissible under Connecticut law unless it is to rehabilitate a witness whose credibility has been impeached by a prior inconsistent statement, by a suggestion of bias, interest or improper motive, by a claim of faulty memory or by a suggestion of recent contrivance. State v. Valentine, 240 Conn. 395, 413, 692 A.2d 727 (1997). Absent a direct attack on credibility by one of these specific methods prior consistent statements are not admissible. Id. Even then, the prior consistent statement is not admissible for its truth, but only to rehabilitate the witness. Id.; State v. Brown, 187 Conn. 602, 607-610, 447 A.2d 734 (1982). Since the petitioner did not testify, the polygraph evidence he sought to admit was irrelevant and inadmissable under established rules of evidence.

A basic underpinning of our trial process is that a jury or court's assessment of credibility is based on a common sense evaluation of the demeanor, bias and plausibility of a witness's testimony. The petitioner attempted to place before the jury his out of court statement denying the offense together with the results of his ex parte polygraph examination, while at the same time ensuring that he could not be questioned about either the events relating to the three fires or the circumstances which might relate to the validity and reliability of his polygraph examination. This claim that he has a fundamental constitutional right to offer, without testifying himself, his own out of court, self serving denial together with a polygraph examiner's opinion as to its truthfulness, while at the same time preventing the jury from evaluating his demeanor on the witness stand and the plausibility of his explanation of the events, is without merit.

CONCLUSION

For the above reasons, the respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted

BY 

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